

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

SERGIO D. NELSON,

Plaintiff,

v.

CALIFORNIA SUPREME COURT,

Defendant.

No. C 15-3440 NJV (PR)

**ORDER OF DISMISSAL WITH
LEAVE TO AMEND**

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis. (Doc. 3.)

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed factual

1 allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a
3 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief
4 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
5 (citations omitted). A complaint must proffer "enough facts to state a claim to relief that is
6 plausible on its face." *Id.* at 570. The United States Supreme Court has recently explained
7 the "plausible on its face" standard of *Twombly*: "While legal conclusions can provide the
8 framework of a complaint, they must be supported by factual allegations. When there are
9 well-pleaded factual allegations, a court should assume their veracity and then determine
10 whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662,
11 679 (2009).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
13 elements: (1) that a right secured by the Constitution or laws of the United States was
14 violated, and (2) that the alleged deprivation was committed by a person acting under the
15 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

16 **B. Legal Claims**

17 Plaintiff seeks an order compelling the California Supreme Court to schedule oral
18 arguments in his criminal appeal.

19 Under principles of comity and federalism, a federal court should not interfere with
20 ongoing state criminal proceedings by granting injunctive or declaratory relief absent
21 extraordinary circumstances. See *Younger v. Harris*, 401 U.S. 37, 43-54 (1971). Federal
22 courts should not enjoin pending state criminal prosecutions absent a showing of the state's
23 bad faith or harassment, or a showing that the statute challenged is "flagrantly and patently
24 violative of express constitutional prohibitions." *Younger*, 401 U.S. at 46, 53-54 (cost,
25 anxiety and inconvenience of criminal defense not kind of special circumstances or
26 irreparable harm that would justify federal court intervention; statute must be
27 unconstitutional in every "clause, sentence and paragraph, and in whatever manner" it is
28

1 applied). The rationale of *Younger* applies throughout appellate proceedings, requiring that
 2 state appellate review of a state court judgment be exhausted before federal court
 3 intervention is permitted. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975);
 4 *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 223 (9th Cir. 1994) (even if criminal
 5 trials were completed at time of abstention decision, state court proceedings still
 6 considered pending). Abstention may be inappropriate in the "extraordinary circumstance"
 7 that (1) the party seeking relief in federal court does not have an adequate remedy at law
 8 and will suffer irreparable injury if denied equitable relief, see *Mockaitis v. Harclerod*, 104
 9 F.3d 1522, 1528 (9th Cir. 1997) (citing *Younger*, 401 U.S. at 43-44), or (2) the state tribunal
 10 is incompetent by reason of bias, see *Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973). A
 11 party who alleges bias must overcome a presumption of honesty and integrity in those
 12 serving as adjudicators. See *Hirsh v. Justices of the Supreme Court of Cal.*, 67 F.3d 708,
 13 713 (9th Cir. 1995) (citation omitted).

14 Plaintiff is a condemned prisoner represented by counsel in his direct appeal to the
 15 California Supreme Court. See Case No. S048763. His appeal has been fully briefed
 16 since December 2010. *Id.* For relief in this case, plaintiff seeks an oral argument date for
 17 his case. As noted above, a federal court should not interfere with an ongoing state
 18 criminal appeal absent extraordinary circumstances. In addition, federal district courts lack
 19 the power to issue writs of mandamus directing state courts, state judicial officers, or other
 20 state officials in the performance of their duties. Accordingly, a petition for a writ of
 21 mandamus "to compel a state court or official to take or refrain from some action is frivolous
 22 as a matter of law." *Demos v. U.S. District Court*, 925 F.2d 1160, 1161-62 (9th Cir. 1991)
 23 ("[T]his court lacks jurisdiction to issue a writ of mandamus to a state court."). The
 24 complaint is dismissed with leave to amend to address these issues.

25 CONCLUSION

26 1. The complaint is **DISMISSED** with leave to amend in accordance with the
 27 standards set forth above. The amended complaint must be filed within **twenty-eight (28)**
 28

1 **days** of the date this order is filed and must include the caption and civil case number used
2 in this order and the words AMENDED COMPLAINT on the first page. Because an
3 amended complaint completely replaces the original complaint, plaintiff must include in it all
4 the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.
5 1992). He may not incorporate material from the original complaint by reference. Failure to
6 amend within the designated time will result in the dismissal of this action.

7 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
8 court informed of any change of address by filing a separate paper with the clerk headed
9 "Notice of Change of Address," and must comply with the court's orders in a timely fashion.
10 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
11 Federal Rule of Civil Procedure 41(b).

12 **IT IS SO ORDERED.**

13 Dated: September 11, 2015.



NANDOR J. VADAS
United States Magistrate Judge